No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,
Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Circuit erred in failing to apply this Court's "state action" tests and in adopting a *per se* rule that private operators of public access channels are "state actors" for constitutional purposes, even where the state has no control over the private entity's board, policies, programs, facilities or operations, provides none of its funding, and is not alleged to have been involved in the conduct challenged in the pleadings.

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INTEREST OF *AMICUS CURIAE* [1]

The Cato Institute is a nonpartisan, public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs.

Consistent with its values, Cato believes that the Bill of Rights, including the First Amendment, must be preserved as a safeguard against government infringement on individual liberty, rather than used to burden private citizens in the resolution of their disagreements with other private citizens. The Second Circuit's expansive view of the "state actor" requirement improperly treated private parties as creatures of the state without considering whether those parties' speech and editorial decisions were subject to meaningful state control.

Cato offers this brief in support of Petitioner to protect the idea of state action that is at the heart of the First Amendment. The decision below illegitimately reads the state actor requirement out of the state actor test and in so doing imperils the free expression that the First Amendment protects.

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, counsel for all parties received timely notice of *amicus*'s intent to file this brief, and consented in writing. No counsel for any party authored this brief in any part; no person or entity other than amicus or its counsel made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

The First Amendment, by its very terms, restricts actions by the state, not those of private persons. The only way the Constitution could burden a private person with the duty to "make no law . . . abridging the freedom of speech" is if that person stood in the shoes of the state. This Court's "state action" precedents establish that this requisite control by, or complicity with, the state is absent unless the person is either acting jointly with the state, performing a public (*i.e.*, a state) function, or being compelled by the state to act. As applied to a case like this, the appropriate question therefore is whether the private person's speech or editorial decisions can fairly be attributed to the state, not whether the state has in some way allowed the person to operate in what can be described as a public forum.

The need for Respondents to show that the state acted in concert with Petitioners to the extent of controlling their editorial decisions stems from the very nature of the Bill of Rights. A state has certain powers that private parties do not. The Founding Fathers created the Bill of Rights to circumscribe those uniquely governmental powers with duties uniquely applicable to the state. For example, because the state has the power to search and seize private property or deprive a person of life, liberty, or property, the Constitution places limits on the state's ability to exercise those powers, such as the requirements to get a warrant (Fourth Amendment) or provide due process (Fifth Amendment).

So too when it comes to the First Amendment. Allowing the state unfettered power to interfere with the flow of speech in the marketplace of ideas would

allow the state to alter discourse and consequently interfere with the search for truth. The First Amendment therefore prevents the state from restricting who may speak and what they can say. This risk of abuse of power is absent, though, when a private person is speaking or—as relevant here—deciding who may use its property to speak. Allowing lawsuits that challenge the editorial decisions of private persons who promote speech via their private property would unduly and unnecessarily stifle the free flow of speech in the marketplace of ideas. Thus, while Petitioners should prevail here, it is of even greater importance for this Court to clearly hold that the First Amendment does not saddle a private person with burdens that were created to check state power, unless that person is standing in the state's shoes.

ARGUMENT

I. THE MARKETPLACE OF IDEAS FUNCTIONS BEST WHEN STATE ACTORS CANNOT IMPAIR THE SPEECH AND EDITORIAL RIGHTS OF PRIVATE ACTORS.

This Court has often used the "marketplace of ideas" as a metaphor to illustrate the benefits of free speech. When private participants in the marketplace of ideas are free to propose, debate, and accept or reject ideas, the marketplace becomes a powerful identifier of true and superior ideas.

State interference distorts the marketplace of ideas. The state's unique coercive powers would allow it to elevate favored speech, suppress disfavored speech, and—in so doing—tilt the entire marketplace

in its favored direction. Private participants, on the other hand, lack the state's coercive power in the marketplace. The inability of private parties to tilt the marketplace of ideas explains why the First Amendment proscribes only *state* interference with speech.

A. A Robust Marketplace of Ideas Is an Optimal Environment for the Emergence of True and Superior Ideas.

Nearly 100 years ago, Justice Holmes wrote that "the theory of our Constitution" is that "the ultimate good desired is better reached by free trade in ideas," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In so writing, Justice Holmes succinctly captured one of the foremost theories animating the First Amendment's protections of free speech.

The apt metaphor of a "market" in which speakers can trade in ideas "conceptualized the purpose of free speech so powerfully that" Justice Holmes' *Abrams* dissent "revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech." Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821, 823–24 (2008). The "marketplace of ideas," as Justice Brennan later put it, *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring), has since become a staple of the Court's free speech jurisprudence. *See, e.g., Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981) ("The Court has long viewed the

First Amendment as protecting a marketplace for the clash of different views and conflicting ideas."); *see also* Blocher, *supra*, at 825 n.7 (collecting First Amendment cases in which the Court has relied on the concept of a marketplace of ideas). Indeed, the Court reaffirmed Justice Holmes' observations about the marketplace of ideas as recently as last Term. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) ("*NIFLA*") ("The best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." (alteration omitted) (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting))).

Believers in free speech have long recognized the importance of a robust exchange of ideas in the search for truth. In 1644, John Milton wrote,

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

John Milton, *Areopagitica* 58 (Cambridge, The University Press 1918) (1644), https://tinyurl.com/y7muykoj. In 1859, John Stuart Mill also argued that the free exchange of ideas enables truth to overcome error, and added that encountering erroneous ideas *benefits* participants in the marketplace:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is

> right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

John Stuart Mill, *On Liberty*, *in* 18 Collected Works of John Stuart Mill 213, 229 (Univ. of Toronto Press 1977), https://tinyurl.com/yar4am3f.

Mill further argued that the best approach for "knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind." *Id.* at 232. Indeed, according to Mill, it is not "in the nature of human intellect to become wise in any other manner" and "[t]he steady habit of correcting and completing [one's] own opinion by collating it with those of others . . . is the only stable foundation for just reliance on it." *Id.*

When the marketplace of ideas is functioning properly, not only do those who participate benefit, but so does society. Mill wrote that "[w]rong opinions and practices gradually yield to fact and argument." *Id.* at 231. When flawed ideas give way to superior ideas, the societal customs and traditions that are founded on those ideas give way as well. This progression benefits all of society.

In fact, the process is doubly beneficial because a robust marketplace of ideas continually retests even the ideas that emerge as true and superior. Some of yesterday's "best" ideas are replaced with better ones today, and some of today's "best" ideas will be replaced with better ones tomorrow. *Cf.* Guy Sorman,

Schumpeter in the White House, City Journal (Spring 2012), https://www.city-journal.org/html/schumpeter-white-house-13462.html (under the economic theory of "creative destruction," "progress in a capitalist economy requires that the old give way constantly to the new: production technologies in a free economy improve constantly, and new products and services are always on offer"). Hence freezing the marketplace at any point risks entrenching ideas that will eventually become obsolete, and depriving the public of superior ideas yet to come.[2]

B. State Interference Distorts the Marketplace of Ideas Through Coercion.

Unlike private participants in the marketplace of ideas, the state possesses power "to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). This power arises from the government's unique capacity to compel behavior and impede personal freedom. *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 236 (1992) ("The state is the law, and the law is final—even when the law appears in the humble guise of a municipal ordinance.").

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[2] Many subjects of discussion in the marketplace of ideas, such as the arts, are a matter of preference. The pluralism of the marketplace is better suited than is the state to meeting the diverse preferences of market participants on these subjects too. *See* Tyler Cowen, *In Praise of Commercial Culture* 1 (1998) ("The capitalist market economy is a vital but underappreciated institutional framework for supporting a plurality of coexisting artistic visions . . . .").

This coercive power enables the state to "distort the market for ideas" in a way that private parties cannot. *Leathers v. Medlock*, 499 U.S. 439, 448 (1991).[3] The state's power does not just clash with private speech in the marketplace—it tilts the entire marketplace itself. When the state elects to support certain speech, its coercive power disproportionately elevates that speech in the marketplace. *See* Edmund Burke, *Letter No. 1. On the Overtures of Peace (1796), in* 3 Select Works of Edmund Burke 59, 148 (Liberty Fund, Inc. 1999), https://tinyurl.com/ydecpqyx ("Reason, clearly and manfully delivered, has in itself a mighty force; but reason, in the mouth of legal authority, is, I may fairly say, irresistible.").

Similarly, when the state elects to suppress certain speech, its coercive power disproportionately quiets—and in some cases, silences—that speech in the marketplace. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) ("[W]henever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas . . . ."); *Simon & Schuster, Inc. v. Members of*

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[3] This is similar to the distortive effect of state interference in economic markets. *See, e.g.*, Murray N. Rothbard, *Man, Economy, and State with Power and Market* 1061 (Ludwig von Mises Inst. 2d ed. 2009), https://tinyurl.com/y8nrn4t9 ("Coercive intervention . . . signifies *per se* that the individual or individuals coerced would not have done what they are now doing were it not for the intervention."); A. Barton Hinkle, *Government Incentives to Business Distort Free Market Forces*, Reason.com, https://reason.com/archives/2015/07/27/government-incentives-to-business-distor (July 27, 2015) ("Government incentives to business interfere with [the free market] process. They take resources out of the economy and redirect them in ways they would not otherwise go.").

N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.").

"[T]he people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2375. This is because, among other reasons, state interference in the marketplace of ideas risks the acceptance of ideas that the market would otherwise have rejected, and the rejection of ideas that the market would otherwise have accepted.[4] Indeed, coercive state interference can influence the acceptance of an idea in the marketplace without regard for its "truth." Such a result runs contrary to the principle underlying the marketplace of ideas, that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

State interference does more than just directly alter the marketplace of ideas; it chills future speech. *See* Frederick Schauer, *Fear, Risk and the First*

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[4] State intervention is undesirable even if the marketplace is independently inclined towards an idea the state favors. Mill argued that silencing erroneous speech deprives the marketplace of a "clearer perception and livelier impression of truth, produced by its collision with error." Mill, *supra*, at 229.

Moreover, as discussed *infra* at 9–10, state intervention sets a precedent that chills speech in the future. Thus, even if the state's favorite ideas temporarily align with the marketplace's, the risk of distortion remains because the state's power can entrench ideas that the marketplace otherwise might have replaced.

Amendment: Unraveling the "Chilling Effect," 58 B.U. L. Rev. 685, 693 (1978) ("Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should."). For example, jailing a speaker for what he says likely will discourage other potential speakers from expressing their ideas, for fear of state retribution. This deprives the marketplace of the opportunity to consider fully the ideas of these potential speakers too. *See id.* (The deterrence of speech "is to be feared not only because of the harm that flows from the non-exercise of a constitutional right, but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised.").

The First Amendment protects the freedom of speech from state interference. By its very terms, the provision directs that "Congress shall make no law . . . abridging the freedom of speech." When courts properly interpret the First Amendment to prevent state interference, the marketplace of ideas is left to function properly. Thus, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641; *see also Cohen v. California*, 403 U.S. 15, 24 (1971) (stating that the "right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion," thereby "putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity").

C. Private Actors Must Have Freedom to Control Speech Within Their Spheres of Influence.

Concerns about state interference in the marketplace of ideas do not apply when a private actor lawfully controls speech within its "sphere of influence" through the exercise of its own rights. For example, a private billboard owner is free not to rent billboard space for a political message with which she disagrees. The owner has a right to avoid associating with the message, and certainly to avoid promoting the message. And the potential customer would have a right to pursue posting the message elsewhere. Likewise, a private company is free to insist, as a condition of employment, that employees not publicly disparage the company's products. In the end, a private actor's message can only exercise the power of persuasion in the marketplace of ideas; others remain free to ignore, debate, challenge, or accept the message.

To be sure, private participants in the marketplace vary in the amount of influence and resources they possess, but that is categorically different from the coercive power of the state. *See* Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 Sup. Ct. Rev. 129, 138 & n.41 (1988) (distinguishing private power from government power and stressing that "even the most powerful corporation cannot directly control the armed might of the state"). A private actor lacks the power that the state could wield to exclude viewpoints from the marketplace of ideas. *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 153 (1973) (Douglas, J., concurring) ("[F]or one publisher who may suppress

a fact, there are many who will print it. But if the Government is the censor, administrative fiat, not freedom of choice, carries the day."). Accordingly, private actors are unable to tilt the marketplace of ideas in the same manner as state actors.

In fact, the marketplace of ideas functions best when private actors are left free to control speech within their spheres of influence. Private actors participate in the marketplace of ideas through both what they say and what they elect *not* to say, including what they prevent others from saying within their spheres of influence. Indeed, "individual decisions about speech—preferring some ideas and information to others, placing one's property at the service of some ideologies and not others—are central to the concept of a marketplace of ideas." Frederick F. Schauer, Hudgens v. NLRB *and the Problem of State Action in First Amendment Adjudication*, 61 Minn. L. Rev. 433, 448–49 (1977). This is particularly true of private actors who dedicate their property to expressive functions as they exercise discretion in determining what ideas and viewpoints to use their property to publish (and not to publish). *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (explaining that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising" and that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment").

A private actor's limitations on who may use that actor's property for speech and what ideas may be expressed on the actor's property stem from the private actor's rights of free expression—and therefore fundamentally differ from state limitations on speech. *See* Fried, *supra*, at 237 (explaining that "[p]rivate impositions and limitations [on speech] differ fundamentally from state impositions" because "they issue from the limiting person's own exercise of liberty").

Moreover, a private actor's use of his property for expressive purposes also arises from his possessory rights in property. *See* Gary Chartier, *An Ecological Theory of Free Expression* 21 (2018) ("Respecting people's justly acquired possessions provides a clear, simple, and robust basis for protecting their freedom of expression. Possessory rights determine who will have the right to speak where and using what media."); Fried, *supra*, at 237 ("Private impositions and limitations [on speech] . . . . derive from other private rights that the limiter might have: rights to privacy, or more commonly, rights to property."). Accordingly, the state's enforcement of private actors' property rights facilitates their use of property for expressive purposes and thus their participation in the marketplace of ideas. *See* Chartier, *supra*, at 13 ("Robust protections for just possessory rights ground and enable participation in the ecosystem of expression."). When the state properly limits its role to protecting property rights, "[p]eople's right to control their justly acquired possessions provides a powerful safeguard against interference with expressive activity." *Id.* at 14. The proper role of the state in such circumstances, then, is to allow private actors to safeguard their property

rights—including the right to choose *who* may use their property for speech and to express *which* ideas—through peaceful rather than violent means.

Treating private parties as state actors—especially as a constitutional mandate rather than a legislative condition that the private party may accept or reject—would require private parties to adhere to the same content-neutrality norms that constrain public entities and would consequently interfere with their free expression of ideas on their property. Indeed, a property owner subject to the limits of the First Amendment would be unable to deny the use of his property when he has legitimate concerns about the ideas the putative user might express. And that property owner would face a constant risk of litigation by those who believe content played a role in the allocation of finite resources to potential speakers. Subjecting private parties to the First Amendment's proscriptions would therefore cause them to lose control over what is expressed within their spheres of influence and restrict their ability to express views and ideas freely. Such a result would trivialize the very concept of the marketplace of ideas because private individuals, communities, and institutions—particularly those devoted to expressive functions—would be deprived of "rights to offer to, and consume from, the marketplace of ideas." Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes A Curse*, 45 UCLA L. Rev. 1537, 1617–18 (1998). In this sense, compelling private actors to "tolerate the speech of others in a way that the public sector must allow ultimately forfeits many of the very values of free expression" itself. *Id.* at 1606.

II. THE MARKETPLACE OF IDEAS IS BEST PRESERVED WHEN PRIVATE ACTORS, WHO ARE NOT DOING THE BIDDING OF THE STATE, RETAIN THEIR FIRST AMENDMENT FREEDOMS.

The values underlying the First Amendment are best served by limiting government interference with speech and maintaining a private sphere in which private actors retain the freedom to choose which ideas and values to pursue. The "state actor" requirement is critical to maintaining such a private sphere by ensuring that the First Amendment's proscriptions are only imposed on the state—and not private parties who act as private parties. As this Court has explained, "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982); *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (stating that the state action doctrine furthers the constitutional objective of permitting citizens to structure private relations).

The decision below improperly rewrites the state action requirement, thus significantly expanding the circumstances in which private parties may be subjected to the First Amendment's proscriptions. In particular, the decision shifts the focus of the state action analysis away from whether the state exercised control over the private party's speech or editorial decisions to look instead at the nature of the forum where the speech occurred.

A. A "State Actor" Requirement that Focuses on Meaningful State Control Over Speech Content Correctly Distinguishes Between State and Private Actors in the Marketplace of Ideas.

In determining whether a private entity can be treated as a state actor, this Court has focused on whether the state exercises meaningful control over the private entity's conduct, here the entity's editorial decisions. This Court has explained that for the conduct of a private entity to be "fairly attributable" to the state, there must be "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted). "The purpose of" the close-nexus "requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original).

This Court has accordingly set forth three tests for determining whether the requisite control by, or complicity with, the state exists such that a private entity may be treated as a state actor: (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state (the "compulsion test"); (2) the state provides "significant encouragement" to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies (the "joint action test"); and (3) the entity "has been delegated a public

function by the [s]tate," (the "public function test"). *Brentwood Acad.*, 531 U.S. at 296–97, 303 (internal quotation marks omitted). In contrast, "[a]ction taken by private entities with the mere approval or acquiescence of the [s]tate" is not state action. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). Similarly, conduct by a private entity is not fairly attributable to the state merely because the private entity is a business subject to extensive state regulation or "affected with the public interest." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350–53 (1974) (rejecting argument that a private electricity provider is a state actor because the state conferred "monopoly status" upon the company).

By limiting the "state actor" requirement to circumstances in which the state exercises meaningful control over the speech and editorial decisions of private actors, courts can effectively limit state interference in the marketplace of ideas while preserving the full expression of ideas by private actors. Indeed, in circumstances where the state does not exercise control over what a private actor says or allows others to say, the private actor's limitations on the speech within, and originating from, that actor's sphere of influence is an exercise of that actor's rights of free expression. The First Amendment should not interfere with a private actor's speech decisions, including which speech it does *not* permit.

Focusing on meaningful state control over content resolves the related concern of state actors skirting their constitutional obligations by enlisting private actors to do their bidding. *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) ("It surely

cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). Meaningful control in this context would mean that the state imposed its editorial views on the private actor, much like the monkey's use of a cat's paw in Jean de La Fontaine's fable. *See* Jean de La Fontaine, *A Hundred Fables of La Fontaine* 140–41 (London, The Bodley Head 2d ed. n.d.). So long as a private actor in the marketplace of ideas is not doing the state's bidding on which ideas should be promoted or demoted, the First Amendment has no role to play.

B. The Decision Below Failed to Consider Whether Petitioners Exercise Meaningful State Control.

The panel majority below concluded that Petitioners engaged in "state action" when they suspended Respondents from airing programs on MNN's public access channels. However, in reaching this conclusion, the panel majority did not apply any of this Court's "state actor" tests.

Instead of looking for meaningful state control, the majority below found state action by focusing on the nature of the forum. The majority first concluded that public access channels are public forums because "[a] public access channel is the electronic version of the public square," and then reasoned backward to draw a conclusion about whether Petitioners are state actors. Pet. App. 13a. Moreover, the majority treated its public forum holding as all but dispositive of the state action question. Pet. App. 14a ("Because facilities or locations deemed to be public

forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations."). The majority reasoned that "whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors," and concluded this standard was satisfied because the borough president designated MNN to run public access channels—a merely nominal connection between MNN and the state. Pet. App. 14a–15a (reasoning that the mere fact "that the Manhattan Borough President designated MNN to run the public access channels" creates "a sufficient connection to governmental authority" for employees of MNN "to be deemed state actors"). This cannot even be called "adherence," let alone "*[c]areful* adherence," *Lugar*, 457 U.S. at 936 (emphasis added), to the "state actor" requirement as established by this Court's precedents.

The majority's decision erroneously shifts the focus of the "state actor" requirement away from determining whether there is evidence of meaningful state control over a private party's editorial decisions. Instead, the majority's reasoning assumes it is the nature of the forum—rather than state control over how that forum decides who speaks or what they say—that determines whether the First Amendment's restrictions apply. Focusing the state actor question on the public nature of the forum—rather than meaningful state control of the speech itself—significantly dilutes the test for what constitutes state action and potentially subjects a wide range of

private actors to First Amendment regulations. Under the majority's decision, if a private actor opens its property for public use and owes the availability of its forum to the good graces of the state, the private actor will lose its freedom to choose the speech and ideas that may be expressed in that forum.

Such a result would undermine the editorial discretion of private actors who hold open their property for expressive purposes. These actors necessarily make editorial decisions about the speech and viewpoints that will and won't be expressed in a finite space. A public access channel, for example, cannot air every and any proposed content. A channel operator's decision to host certain content is therefore a decision to exclude all else. *See Freedom of Expression Act of 1983: Hearing on S. 1917 Before the S. Comm. On Commerce, Sci., and Transp.*, 98th Cong. 90 (1984) (statement of Roy M. Fisher, Professor and Dean Emeritus, Univ. of Mo. School of Journalism) ("[T]ime for a broadcaster is a finite property. Something else must go if the broadcaster is taxed to provide more complete coverage of an issue."). If the ruling below stands, the private actor's editorial decisions—including which speech to host—would expose that actor to lawsuits by those who assert that their views have been disfavored. This risk of costly litigation could chill the editorial process, preventing (indeed, forbidding) such private actors from exercising *their* First Amendment right to select which speech to express based on its content or viewpoint. Faced with the threat of liability for the mere exercise of editorial control, some private actors may abstain from dedicating their property to expressive purposes, and in the case of public access

channels, which are required by law to be held open to the public, the threat of constitutional liability may dissuade private actors from agreeing to operate the channels in the first place.

In sum, allowing this decision to stand would shrink the sphere in which private actors are free to pursue diverse ideas and values, thus allowing the First Amendment's *proscriptions* to undermine the values embodied in its *protections*.

III. FAILURE TO ENFORCE THE "STATE ACTOR" REQUIREMENT PROPERLY COULD HAVE UNINTENDED FAR-REACHING CONSEQUENCES FOR OTHER PLATFORMS AND MEDIA.

The rule enunciated in the decision below diverges from established law in a way that could ultimately endanger a wide range of other platforms, particularly digital and web-based media. The Second Circuit's reasoning—that the designation of a private company to operate a public forum can be sufficient to render the company a state actor—logically applies to an array of other media operators, such as internet service and content providers. Indeed, such platforms are arguably "the electronic version of the public square," which the decision below treats as all but dispositive of the state action inquiry. Pet. App. 13a. The "state actor" requirement should not be used to treat private digital and web-based media platforms as governmental actors merely because the forum in which they operate appears to be public in nature. But the Second Circuit's decision opens the door to applying the state action doctrine in this way.

The Court should not lightly endorse a new constitutional test that could affect the ever-evolving world of web-based media:

> While we now . . . realiz[e] that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).

The risk of civil liability is not an abstract hypothetical for internet service and content providers. To the contrary, academic commentary and recent lawsuits have already raised the possibility of relaxing the "state actor" requirement as applied to internet service providers and social media platforms. Some commentators have proposed modifying the state actor requirement, along the lines of the decision below, such that private internet service providers and social media platforms could be treated as state actors for First Amendment purposes. *See, e.g.*, Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—Or Lack Thereof—To Third-Party Platforms*, 32 Berkeley Tech. L.J. 989, 1022–26 (2018); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 Berkeley Tech. L.J. 1115, 1160–70 (2005).

Moreover, litigants have been emboldened in arguing that private owners and administrators of

online platforms, such as Google, YouTube, and Facebook, are state actors. So far, courts have rejected these arguments and held that private online service providers and social media platforms are not state actors for First Amendment purposes. *See, e.g., Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 WL 1471939, at *8 (N.D. Ca. Mar. 26, 2018) (dismissing Section 1983 claim against Google because it did not amount to state actor); *Shulman v. Facebook.com*, No. 17-cv-00764, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (rejecting arguments that Facebook is a state actor for constitutional purposes); *see also Howard v. Am. Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (rejecting argument that AOL should be deemed a state actor because it is a "quasi-public utility" that involves "a public trust").

Some courts, however, have used the public forum doctrine to hold that the First Amendment applies to specific "accounts" or "pages" on social media sites. *See, e.g., Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 565–75 (S.D.N.Y. 2018) (holding that a Twitter account operated by a public office constitutes a public forum); *Davison v. Plowman*, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017) (holding that a Facebook page operated by a county attorney's office serves as a limited public forum). These decisions, when combined with the majority's diluted "state actor" requirement in public forums, raise the specter of potential liability for private owners of these sites.

Relaxing the "state actor" requirement could have serious unintended consequences for digital and web-based enterprises. In fact, it is difficult to believe these innovations would exist today had their crea-

tors thought constitutional liability was part of the bargain. Most of these platforms' business models are based on individualizing content so that users are presented with information useful and relevant to them, which necessarily entails restricting the flow of speech from a wide array of other speakers. *See* Kate Klonick, *The New Governors: The People, Rules and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1599 (2018) ("[W]hile it might appear that any internet user can publish freely and instantly online, many platforms actively curate the content posted by their users."). Introducing the risk of liability now will discourage present and future innovation in these marketplaces.

Regulation of content in these private spaces should be left to their owners rather than litigated under the auspices of the First Amendment. The private sector has already designed creative, market-based solutions to moderate content consistent with the wishes of their customers. *See* Klonick, *supra*, at 1635–48 (exploring the various facets of content moderation in social media). The imposition of constitutional liability would deprive private enterprises of the full right to choose how to participate in the marketplace of ideas. The Court should clarify that private actors risk such liability only where their speech and editorial decisions are subject to meaningful state control.

CONCLUSION

For the foregoing reasons, the Court should reject the Second Circuit's analysis and reaffirm that the "state actor" requirement for First Amendment lia-

bility necessitates meaningful state control over the decisions of the actor in question.

Respectfully submitted,

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